BUREAU OF MEDIATION SERVICES

In re the Arbitration Between

Education Minnesota - Roseville
Roseville, Minnesota,
Union,

and BMS Case No.: 06-PA-1255

Independent School District No. 623
Roseville, Minnesota,
Employer.

DECISION and AWARD

BEFORE: Bernice L. Fields, Arbitrator

APPEARANCES:

For the Union, Education Minnesota	Rebbeca Hamlin, Attorney, Education Minnesota 41 Sherburne Ave., St. Paul, MN 55103
For the Employer, Independent School District No. 623, Roseville, MN	Karen P. Kepple, Attorney, 2540 East County Rd. F White Bear Lake, MN 55110
Place of Hearing:	Roseville, Minnesota
Date of Hearing:	March 29, 2007
Date of Award:	May 23, 2007
Relevant Contract Provision:	Article IV, Sec. 1; Article VI, Sec. 2, Sec. 4; Article XVI, Sec. 4, Sec. 5
Type of Grievance:	Teacher Salary Placement

Award Summary:

The grievance is denied.

/s/
(Signature of Arbitrator)

I. INTRODUCTION

This matter came on for hearing March 29, 2007, after the parties requested binding arbitration from the Bureau of Mediation Services (BMS) for teacher placement issues they were unable to resolve through negotiation. The Union, Education Minnesota – Roseville, was represented by Ms. Rebecca Hamlin, attorney. The Employer, Independent School District No. 623, was represented by Ms. Karen Kepple, attorney.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross examine witnesses, and to argue their positions. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties. The parties did not raise any substantive or procedural arbitrability issues. The Arbitrator closed the hearing on May 3, 2007 after submission of briefs by the parties.

II. STATEMENT OF THE FACTS

Ken Sopcinski, hereinafter Grievant, is the auto mechanics teacher for the Roseville School District, ISD No. 623, hereinafter Employer. He was hired in 2000 and placed on the 6th step of the salary schedule. The Grievant advanced one step each year until the 2004-2005 school year when he was frozen at step 9 because he had not completed the continuing education requirement of at least fifteen graduate credits beyond his Bachelor's Degree. He remained at step 9 for two years which meant that he did not get annual salary increases. Grievant alleged in grievance proceedings that he was "tired of going to school after taking six years to get his BA for teaching and did not want to go back to school during the time he was frozen" at step 9. At the hearing he alleged that his wife was also earning her Masters and they had a child, so he wanted to wait.

In late August 2005, the Grievant came to the Employer and announced that he had completed the necessary graduate credits to move up on the salary schedule. After verification of his credits, the Employer determined that Grievant would be moved up one step on the salary schedule from step 9 to step 10, which is new step 7 on the new 2005-2007 contract. Grievant believed that he should be moved three steps forward to old step 12, new step 9 of the 2005-2006 contract. Grievant alleged that he should be awarded the additional step movement based on his years of teaching experience while he was frozen. The Employer informed Grievant that it would move him only one step forward and informed Grievant of his right to grieve its decision.

At the time of Grievant's meeting with the Employer in August 2005, contract negotiations were continuing and the Employer was not changing the salary schedule for any teachers until the contract was settled. Grievant did not file a written grievance although the Union met with the Employer several times to discuss Grievant's situation.

In January 2006 when Grievant received his first paycheck under the new contract, he became aware that he had been advanced only one step on the salary schedule. Grievant did not file a grievance. On March 22, 2006 Grievant filed a written grievance with the Employer. On April 3, 2006 the Employer responded denying Grievant's request to be moved three steps forward on the salary schedule and noting that his grievance was untimely. The parties agreed to waive Level I grievance proceedings and moved through grievance proceedings until the matter was referred to arbitration.

III. RELEVANT CONTRACT PROVISIONS

Article IV

School Board Managerial Rights

A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

Article VI

Compensation

Part I

Section 2

Status of Salary Schedules: Once employed, teachers shall be compensated in accord with the provisions of the Contract concerning recognition of credits and degrees.

Section 3

Salary Schedules(s): The basic salary schedule (s) forth in Appendix A shall be a part of the contract for the year(s) indicated.

Section 4

B.A. Lane Adjustment: Teachers who have not progressed to the BA+15 lane shall not advance beyond new step 8* and new step G for the 2006-07 on the salary schedule.

Part III

Section 1

Present Salary: The rules contained herein relating to placement on the salary schedule shall not deprive any teacher of any salary or credits already

recognized and being paid for at the time of the signing of this Contract.

Section 2

Experience Recognition for Entry Placement on Salary Schedule: Experience which a teacher has had in District 623 or in other fields of employment may be recognized for placement on the salary schedule as specified herein:

Subd. 2. Effective July 1, 1998, in no case may an individual be placed higher on the salary schedule than on actual experience allowed except when mutually agreed upon by the EM-R and the School Board or its representatives.

Article XVI

Grievance Procedure

Section 2

Definition of Grievance: A grievance shall mean an allegation by a teacher (s) resulting in a dispute or disagreement between the teacher (s) and the School Board or its designated representative, as to the interpretation or application of the terms and conditions of this contract.

Section 4 Definitions and Interpretations

Subd. 4 Time Limits. The time limits in this procedure shall be strictly adhered to accept (sic) as extended by written agreement of the parties.

Subd. 8 Failure to File or Appeal. The failure to file a grievance in writing or to appeal a grievance from one level to another within the time periods provided in this procedure shall constitute a waiver of the grievance.

Section 5 Adjustment of Grievance

Subd. 1 Level I. Whenever a grievance exists, the grieving teacher shall try to resolve the difference informally through discussion with the building principal or the immediate supervising administrator. A teacher who is not satisfied with the informal adjustment of the grievance shall, within thirty (30) working days of the event giving rise to the grievance, reduce the grievance to writing and file it with the building principle or immediate administrator on the form set forth in Appendix E. The written statement must be dated and signed by the teacher and Exclusive Representative and shall set forth the facts and state the provisions of this Contract alleged to have been violated. The principal or immediate supervising administrator may meet with the teacher to discuss the grievance and shall indicate he disposition of the grievance in writing, with a copy to the teacher and Exclusive Representative within fifteen (15) working days of the receipt of the written grievance.

IV. POSITION OF THE PARTIES

POSITION OF THE UNION

Even though the Collective Bargaining Agreement (CBA) is clear that the salaries of teachers who do not earn at least fifteen graduate credits by the time they reach a certain level on the salary ladder will be frozen at the cut-off level, the CBA is silent as to where “unfrozen” teachers will be placed once they earn enough credits to move forward on the salary ladder again. Presently, the Employer moves “unfrozen” teachers

one step on the salary ladder and ignores the years of teaching experience the teacher accumulated while frozen. The Union argues that although the CBA is silent on this specific issue, other portions of the agreement are unambiguous on recognizing years of service to the District. Failure to recognize Grievant's years of service in adjusting his salary now that he has completed the required graduate credit will put Grievant in a permanently underpaid position.

The Union argues that the grievance was timely even though it was filed more than thirty days after the event giving rise to the grievance because the parties have a long history of trying to work out differences before filing formal grievances, therefore when the Grievant received his first paycheck in January 2006 and became aware that he was not being moved three steps forward on the salary schedule as he believes was just, it was the Union who decided to delay filing the grievance to give the Employer one more chance to change its mind. In addition, the Union argues that every paycheck after January 2006 creates a new grievance.

EMPLOYER POSITION

There is nothing in the CBA that supports Grievant's view that he should have been advanced three steps on the salary ladder instead of the one step he was granted in August 2005 when he provided proof that he had completed sufficient graduate credits to be "unfrozen." If the parties had intended that teachers whose salaries were "frozen" should recoup experience credit for those steps when they were frozen that language would be in the contract. No language in the CBA states that step movement must equate to years of teaching. In fact, initial step movement is only based on years of teaching until a teacher reaches the frozen level, then teachers

without sufficient credits cannot move forward no matter how many years of experience they have. Allowing teachers to move forward to where they would have been had they promptly achieved the continuing education requirements would diminish the incentive for prompt completion of graduate credits.

In addition, the only other person similarly situated was moved only one step when he completed continuing education requirements, therefore, the Employer is consistent in dealing with "unfrozen" teachers.

The grievance is untimely. Under the clear language of the CBA, a grievance must be filed within thirty days of the event giving rise to the grievance. The triggering event was the District's firm declaration to the Grievant in August 2005 that he would only be moved one step on the salary ladder, and that he had the right to pursue his rights under the contract. At the very latest, the triggering event was the Grievant's January 2006 paycheck which confirmed the existence of the dispute. Grievant's written notice of grievance in March 2006 was well beyond the CBA's time limits for filing grievances.

V. ANALYSIS

A. Absent Any Language In the Collective Bargaining Agreement on an Issue in Dispute, An Arbitrator May Not Guess What the Parties Would Have Done or Legislate What They Should Do As That IS Contract-Making Rather Than Interpretation or Application.

Arbitration is a creature born of a contract between parties. Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over "rights" under such agreements. In these cases, the agreement itself is the point

of concentration, and the function of the arbitrator is to interpret and apply its provisions. The rules, standards, and principles utilized by arbitrators to interpret collective bargaining agreements and ascertain their meanings have been borrowed from the jurisprudence developed by courts to resolve disputes over the meaning of terms contained in ordinary commercial and other nonlabor relations contracts.

Arbitrators have several methods for interpretation. Some apply the "objective approach," others use the "subjective approach," still others the "plain meaning" rule, and the most audacious use the "gap-filling and omitted terms" approach. None of those methods is appropriate here and will not be discussed in detail.

It frequently happens that there is no language in the contract applicable to a particular situation. When the contract is silent on a certain situation, as in this case, I believe the proper solution is that management is free to act unilaterally to resolve the situation. To fill in the gap created by this situation would constitute contract-making rather than contract interpretation or application.

A collective bargaining agreement is like a brick and mortar wall. The mortar foundation is the Employer's original business before the advent of the bargaining unit. In the mortar foundation, the Employer holds all rights. The bricks in the wall are the specific articles in the labor agreement that have been negotiated away from the Employer by the bargaining process. The mortar constitutes the Employer's "reserved rights." These are rights not specifically surrendered in any contract article. The Employer, in the mortar relationship, reserves all the rights it had before collaboration with the labor union. Here, the Employer has ceded to collective bargaining the movement of teachers who have achieved fifteen or more credits. The parties have not

negotiated the obviously rare cases of the movement of teachers who have been frozen on the salary ladder, and therefore that matter is still in the mortar of the Employer's reserved rights. Consequently, the Employer is free to determine the placement of this small category of teachers.

The Employer's testified that it was the District's goal to offer parents the most highly prepared teachers possible and that was the origin of the salary freeze policy for teachers who did not meet continuing education requires within a certain period. Obviously the Union agreed with this policy since the current Article VI, Section 4 has been included in every contract since collective bargaining began.

The plain meaning of "frozen" is no movement. There was no evidence presented that "frozen" really meant that the Employer was banking experience credits or any other benefits for "frozen" teachers until they achieved the BA plus fifteen credits. The fact that the Grievant "assumed" that he would be granted experience credits after achieving sufficient graduate credits is not evidence. In fact, such an assumption is contrary to the policy of freezing non-compliant teachers' salaries.

Failure to comply with the advanced education requirements is something entirely within the teacher's control. The Grievant testified that he "was tired of going to school after taking six years to earn and his BA and did not want to go back to school while he was frozen." Secondly, he alleged that "his wife was pursuing her Masters and he had a small child, so he thought he would wait." Other teachers, undoubtedly, had the same situation and still completed the educational requirements to avoid being arrested on the salary ladder.

A public employer may discriminate among workers if the discrimination is based

on a rational basis and for a valid public policy goal. Handicapped workers may have special parking privileges, or adaptive equipment, or hours that are not provided to all workers. Here, the Employer's public policy goal is to present the highest quality product to students and parents. Therefore, teachers who fail to continue educational advancement stop progressing on the salary schedule. When, and only when, the educational requirements are met can the teacher move forward. Absent contrary language in the CBA it is the Employer who may determine where on the salary ladder the "unfrozen" teacher begins upward progress. Here, the Employer has determined that an "unfrozen" teacher moves one step. The fact that new teachers entering the District with the same number of years of experience that Grievant has will make more money than he will is irrelevant. The choice to delay attainment of the educational requirements was his alone, and behavior has consequences.

This matter should be negotiated by the parties during the next contract negotiations because presently there is not mutual assent for any other interpretation and an arbitrator should not guess what the parties would have done if they had foreseen this issue, or legislate what the parties should do.

B. <u>The Grievance Is Untimely Pursuant to Article XVI, Section 5, Subdivision 1.</u>

The triggering event in this case was Grievant's first paycheck in January, 2006. The applicable period to file a grievance was thirty days from that date. Failure to grieve within that period is a waiver of the right to grieve the issue at all. The Union is incorrect that every pay check is a continuing violation. That rule applies only when a grievant is not aware of the matter giving rise to the grievance when it first occurs. Here, the Grievant knew that he would be moved only one step on the salary ladder in

August 2005. The fact that he was advised to delay filing his grievance to give the Employer another opportunity to change its mind is unfortunate. Article XVI, Section 4, subdivision 4 is explicit:

> Time Limits. The time limits in this procedure shall be strictly adhered to accept (sic) as extended by the written agreement of the parties.

Since this was a case of first impression on this issue, and the issue could recur and involve additional, considerable expense, I decided this matter on the merits, otherwise, I would have dismissed the grievance as untimely.

VI. AWARD

After study of the testimony, other evidence produced at the hearing, the arguments of the parties (in post hearing written briefs) on that evidence in support of their respective positions, on the basis of the above discussion, summary of the testimony, analyses and conclusions, I make the following award:

1. The grievance is denied. This is a matter solely within Article IV, Management Rights

2. The grievance is untimely.

Dated: May 23, 2007

Bernice L. Fields, Arbitrator